Yap Ban Tick & Ors v Standard Chartered Bank

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N-08-139 OF 1994
ZAKARIA YATIM, SHAIK DAUD AND MAHADEV SHANKAR JJCA
1 JULY 1995

Civil Procedure *— Appeal — Leave to appeal out of time — Delay due to mistake of solicitors and court — Unaware of recent amendment — Whether constituted special circumstances — Whether leave could be granted — Courts of the Judicature Act 1964 s 68 — Rules of the High Court 1980 O 56*

The respondent ('the bank') had granted a fixed loan of RM2.4m to Ang Chuan Sdn Bhd ('the borrower'). When the borrower defaulted, the bank commenced summary proceedings under O 14 of the Rules of the High Court 1980 ('the RHC') against the guarantors of the loan ('the applicants'). On 22 August 1994, the court entered judgment against the applicants ('the High Court order'). The guarantors intended to appeal, and their solicitors immediately wrote to the senior assistant registrar to apply for further argument in open court pursuant to s 68(2) of the Courts of Judicature Act 1964 ('the Act') and O 56 r 2(2) of the RHC (collectively referred to as 'the provisions'). It seemed that the applicants' solicitors were unaware that the provisions had been repealed, following the setting up of the Court of Appeal on 24 June 1994. The High Court, which was equally unaware of the amendments, allowed the application and set down 6 October 1994 as the date for further argument. On 3 October 1994, the bank's solicitors informed the applicants' solicitors that they would raise a preliminary objection at the hearing that the court had no jurisdiction to entertain the application due to the error of law. It was at this point in time that the applicants' solicitors and the court realized the mistake. However, pursuant to the amended provisions, the time for appeal had already expired on 22 September 1994. The applicants applied for leave to appeal out of time.

Held, allowing the application:

(1) (Per **Shaik Daud JCA**) The delay in the appeal was caused not only by the ignorance of the law of the solicitors but also of the court. This was compounded by the fact that the event took place only a short while after the provisions had been repealed. Therefore, the applicants ought not to be deprived of their right to appeal.

(2) (Per **Mahadev Shankar JCA**) Although the general principle is that a mistake of counsel is not a special circumstance for enlarging the time for filing an appeal, this is a decision on its own facts. In this case, the bank's solicitors must also be faulted for ignorance as it seemed that they realized the error only on or about 3 October 1994. If they knew of the error earlier, they were then under the

duty to correct the misconception in the minds of the judge and the senior court registrar, before the time for appeal had expired. A

(3) (Per **Mahadev Shankar JCA**) Under the present law, all decisions from the High Court are appealable to the Court of Appeal subject to s 68(1) and (3) of the Act. Pursuant to s 68(1), the applicants could have appealed as of right since leave was only required if the value of the subject matter was less than RM250,000. In fact, the applicants could have done so even if the provisions had not been repealed, as the High Court order was not an interlocutory but a final order. B

C

[Bahasa Malaysia summary

Penentang ('bank itu') telah memberikan suatu pinjaman tetap sejumlah RM2.4 juta kepada Ang Chuan Sdn Bhd ('peminjam itu'). Apabila peminjam itu ingkar, bank telah memulakan prosiding terus di bawah A 14 Keadah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap penggerenti pinjaman itu ('pemohon'). Pada 22 Ogos 1994, D mahkamah telah mencatatkan penghakiman terhadap pemohon ('perintah Mahkamah Tinggi'). Pemohon ingin membuat rayuan, dan peguamcara mereka dengan segera menulis sepucuk surat kepada penolong pendaftar mahkamah bagi memohon untuk hujah selanjutnya di mahkamah terbuka mengikut s 68(2) Akta Mahkamah E Kehakiman 1964 ('Akta itu') dan A 56 k 2(2) KMT (dirujuk secara kolektif sebagai 'peruntukan-peruntukan itu'). Nampaknya, peguamcara pemohon tidak sedar bahawa peruntukan-peruntukan itu telah dimansuhkan, selepas Mahkamah Rayuan ditubuhkan pada 24 Jun 1994. Mahkamah Tinggi, yang juga tidak sedar akan pindaan tersebut, telah membenarkan permohonan itu dan menetapkan 6 F Oktober 1994 sebagai tarikh untuk penghujahan selanjutnya. Pada 3 Oktober 1994, peguamcara bank telah memaklumkan kepada peguamcara pemohon bahawa mereka akan menimbulkan suatu bantahan permulaan semasa perbicaraan bahawa mahkamah tidak mempunyai bidang kuasa untuk membicarakan permohonan tersebut G akibat kesilapan undang-undang. Pada ketika itu, barulah peguamcara pemohon dan mahkamah sedar tentang kesilapan itu. Walau bagaimanapun, mengikut peruntukan yang terpinda, masa untuk membuat rayuan telah tamat pada 22 September 1994. Pemohon telah memohon untuk kebenaran untuk merayu selepas had masa.

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Diputuskan, membenarkan permohonan itu:

(1) (Oleh **Shaik Daud HMR**) Kelengahan dalam membuat rayuan diakibatkan oleh kejahilan undang-undang bukan sahaja pada pihak peguamcara yang berkenaan tetapi juga mahkamah. Tambahan pula, peristiwa ini berlaku sejurus selepas I peruntukan-peruntukan itu telah dimansuhkan. Maka, hak pemohon itu untuk membuat rayuan tidak harus dilucutkan.

(2) (Oleh **Mahadev Shankar HMR**) Walaupun menurut rukun am, kesilapan yang dibuat oleh peguam tidak merupakan suatu

keadaan yang istimewa untuk melanjutkan masa untuk memfailkan suatu rayuan, ini merupakan suatu keputusan yang dibuat berdasarkan faktanya sendiri. Dalam kes ini, peguamcara bank juga mesti dipersalahkan atas kejahilan mereka, kerana nampaknya mereka sedar akan kesalahan itu hanya pada atau lebih kurang pada 3 Oktober 1994. Jika mereka mengetahui tentang kesalahan itu lebih awal, mereka adalah di bawah suatu kewajipan untuk membetulkan tanggapan yang salah pada fikiran hakim dan penolong pendaftar mahkamah, sebelum masa untuk membuat rayuan tamat.

(3) (Oleh **Mahadev Shankar HMR**) Di bawah undang-undang sekarang, kesemua keputusan dari Mahkamah Tinggi boleh dirayu di Mahkamah Rayuan tertakluk kepada s 68(1) dan (3). Mengikut s 68(1) tersebut, pemohon boleh merayu secara terus mengikut haknya kerana kebenaran hanya diperlukan jika nilai perkara adalah kurang daripada RM250,000. Sesungguhnya, pemohon boleh berbuat demikian walaupun peruntukan-peruntukan itu tidak dimansuhkan, oleh kerana perintah Mahkamah Tinggi itu bukan merupakan suatu perintah interlokutori tetapi suatu perintah muktamad.]

[*Editorial Note*: The respondent has appealed to the Federal Court vide Civil Appeal No 02–2–95.]

Notes

For a case on leave to appeal out of time, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 508.

Cases referred to

Bozson v Altrincham Urban Development Council [1903] 1 KB 547 (folld)

Haron bin Mohd Zaid v Central Securities (Holdings) Sdn Bhd [1982] 2 MLJ 94 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 68

Rules of the High Court 1980 O 14, O 18 r 19, O 56 r 2

Appeal from: Civil Suit No 22–49–1992 (High Court, Seremban)

D Krishnan (*Lee Boon Peng & Co*) for the appellant.

Malik Imtiaz (*Raja, Darryl & Loh*) for the respondent.

Cur Adv Vult

Zakaria Yatim JCA: The court had earlier unanimously decided that the application for leave to appeal to this court be allowed. I have read the

judgments of my brothers, Shaik Daud and Mahadev Shankar JJCA, and I entirely agree with their judgments.

Shaik Daud JCA: By way of a notice of motion dated 20 October 1994, the applicant, Yap Ah Peng @ Yap Aun Ping (the fourth defendant in the Seremban Civil Suit No 22–49–1992) applies for an extension of time of 14 days to file and serve a notice of appeal on the respondent, Standard Chartered Bank.

On 22 August 1994, Standard Chartered Bank had entered summary judgment under O 14 of the Rules of the High Court 1980 by way of a summons in chambers dated 22 July 1993. What ensued after that appeared to be rather odd. In his affidavit in support of the application for the enlargement of time, sworn by the applicant himself on 24 October 1994, he deposed that after the O 14 judgment was entered against him, he instructed his solicitors to apply for further arguments in open court. He took this course of action no doubt after being advised by his solicitors who apparently had in mind the provisions of the repealed s 68(2) of the Courts of Judicature Act 1964, which provides that:

> No appeal shall lie from an interlocutory order made by a judge of the High Court in Chambers unless the judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

It is unfortunate that the solicitor concerned was unaware that the above provisions was repealed with effect from 24 June 1994, with the setting up of the Court of Appeal, whereby all applications pertaining to appeals have to be made to the Court of Appeal. It is more unfortunate that the Seremban High Court allowed the application for further arguments in open court. This is evidenced by a letter from the court dated 6 September 1994, issued by the senior assistant registrar which in fact set down 6 October 1994 as the date for the further arguments. It may be acceptable though not excusable for solicitors not to be aware of the amendment but I find it extremely unacceptable and inexcusable for the High Court to be equally unaware. It would appear that it was only on 6 October 1994, the actual date of hearing, that everyone suddenly woke up and became aware of the amendments. By this time it became obvious that the time for filing the appeal was over, hence this application. In this case since the amount of the claim is RM2.4m, no leave to appeal is required.

There was no affidavit filed by the respondent to either oppose or to produce evidence to the contrary. At the hearing of the application on 21 November 1994, both sides were represented by counsel but counsel for the respondent raised no objections to the application. In fact, this delay was caused not only by the ignorance of the law of the solicitors but also it seems of the court. Therefore, it is my view that the applicant ought not to be deprived of his right to appeal, the ignorance or even carelessness

of the solicitor, and in this case compounded by the court itself, ought not to be visited upon the litigant. Since this unfortunate event took place only a short while after the amendment and establishment of the Court of Appeal, the application ought to be allowed. In the circumstances, we exercised our discretion and allowed the application, and the applicant is given seven days to file and serve the notice of appeal.

Mahadev Shankar JCA: At first sight, it could be suggested that in giving this applicant leave to appeal, we departed from the general principle that a mistake of counsel is not a special circumstance for enlarging the time for filing an appeal, but this case is a decision on its own facts.

The Standard Chartered Bank ('the bank') had lent RM2.4m to Ang Chuan Sdn Bhd by way of a fixed loan and RM5m by way of end financing. The applicants ('the guarantors') guaranteed repayment. The borrower defaulted. The bank sued the guarantors.

In response to the statement of claim, the guarantors filed a defence and counterclaim. The bank then applied by way of a summons-in-chambers:

(i) to strike out the defence and counterclaim under O 18 r 19; and

(ii) for summary judgment under O 14.

This summons was dated 22 July 1993. Several affidavits were filed in support and against the application followed by written submissions from both sides in June and July 1994. The last appearance of counsel was in chambers on 18 July 1994, when judgment was reserved.

On 22 August 1994, the judge made an order striking out the defence and counterclaim and gave leave to enter judgment against the guarantor for RM2.4m plus interest and costs.

At this point I must refer to the procedure provided for appeals against an order made in chambers.

Order 56 r 2 of the Rules of the High Court 1980 ('the Rules') provided for appeals from a judge. Rule 2(1) stipulated that such appeals should be subject to s 68 of the Courts of Judicature Act 1964 ('the Act').

By PU(A) 223/80, the old r 2(2) provided that any party dissatisfied with any order made in chambers could apply in writing to the registrar within four days of the order for further argument. The judge could then certify he needed no further argument, or he could hear further argument, and set aside the order made in chambers or make such other order as he thought fit.

On 6 July 1993, by PU(A) 192/93, O 56 r 2 was substituted by the following:

> Subject to the provisions of section 68 of the Act any party may appeal against any judgment, order or decision made by a Judge in Chambers.

At the time, s 68(2) of the Act read as follows:

> No appeal shall lie from an interlocutory order made by a judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument or unless leave is obtained from the Federal Court or from a Judge of the High Court.

What should be noted is that the order and the judgment entered on 22 August 1994, were not interlocutory orders but final orders against which the guarantors could have appealed straightaway, even if s 68(2) of the Act had been perpetuated. *Bozson v Altrincham UDC* [1903] 1 KB 547 was applied in the Federal Court in *Haron bin Mohd Zaid v Central Securities (Holdings) Sdn Bhd* [1982] 2 MLJ 94. This decision is well known in legal circles in Malaysia.

The set-up of our courts underwent a major change in 1994. By Act A 909/95, the Court of Appeal was established, as of 24 June 1994. Section 68(2) of the Act was deleted. All decisions of a High Court judge were appealable subject to the provisions of s 68(1) and (3). Since leave was only required if the value of the subject matter was less than RM250,000, the guarantors could have appealed as of right under the new provision also.

Instead, the guarantors' solicitors wrote a letter to the registrar the very same day the decision was given, ie 22 August 1994. The letter is headed 'Request for further argument in open court under s 68(2) of the Act and O 56 r 2(2) of the Rules'.

This letter was copied to the bank's solicitors, who did not respond.

On 6 September 1994, the registrar wrote to the guarantor's solicitors referring to their letter dated 22 August 1994, and stated that the case had been fixed for further argument in open court on 6 October 1994, at 9am and that the hearing would be proceeded with and judgment given even if the parties were absent. The same letter was sent to the bank's solicitors, who still did not respond.

I think that this is an opportune moment to remind myself of what the Lord Chancellor, Lord Kilmuir said in September 1957 when he addressed the Faculty of Law of the University of Malaya, on 'The Importance of the Study of Law and the Legal Profession in a Democratic Community' [1957] MLJ lvii. He said (inter alia):

> From what I have said, it is obvious that, in my opinion, the legal profession has great power and therefore great responsibility. We must never forget that the lawyer has a double loyalty — to his client and to the law. He must do his utmost for the one but never at the expense of the other. *There are many occasions in practice when it would help the client* to ignore an inconvenient letter, *not to correct a misconception in the judge's mind*, or to suppress an adverse authority. It must never be done, because if the legal profession ceases to enjoy the confidence of the state, the state can no longer afford to abide by the rule of law, and democracy will perish. (Emphasis added.)

In the present case, *if* the bank's solicitors knew of the error aforesaid they were clearly under the duty to correct the misconception in the minds of both the judge and the registrar that the law was as it was stated in the guarantors' solicitors' letter. They did not do so until after the time for appeal expired on 22 September 1994. On 3 October 1994, the bank's solicitors faxed the guarantors' solicitors and posted a letter to say that on the sixth (ie only two clear days before the hearing) they would raise a preliminary objection at the hearing that the court had no jurisdiction to entertain the application. The material before me leaves the possibility open that the bank's solicitors only realized the error on or about 3 October 1994, in which case they too must be faulted at the very least for ignorance.

I have not been supplied with a note of what transpired on 6 October 1994, before the learned judge, or what order was made on that day. Obviously, the judge's direction for further argument, and the registrar's letter which was issued in pursuance thereof were wholly misconceived but how was it vacated? Did it occur to the parties that it was debatable whether an order made without jurisdiction was still an order until it was set aside. Some nullities are voidable not void, and even if void have to be declared so.

The next step in this exercise was the present application for leave to appeal out of time. The guarantors' affidavit in support does not explain satisfactorily how the guarantors' solicitors made such a colossal blunder. The lengthy written submission filed in the court below was relied upon to show merits. The motion was filed on 26 October 1994. It was fixed for hearing on 21 November 1994.

I have not been told when it was served on the bank's solicitors. The solicitor who had the conduct of this matter did not file his affidavit in reply until 16 November. In essence, all it states is that the mistake of the guarantors' solicitors is not a good excuse and there were no merits in the proposed appeal. The lengthy written submissions filed in the High Court were attached in support. Obviously, there is an arguable appeal here.

It is impossible to provide a universal definition of what constitutes 'special circumstances'. In the present case whilst there was no excuse for the mistake made by the guarantors' solicitors, what excuse was there for the conduct of the bank's solicitors in omitting to point out to the registrar that she was doing something the law did not allow?

In my view none whatsoever. I therefore agreed that leave to appeal be granted.

Application allowed.

Reported by Isabel Liong